

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MALCOLM VINCENT LESTER,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration.

Defendant.

CASE NO. 13-cv-05466 JRC
ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos. 18, 27, 28).

After considering and reviewing the record, the Court finds that the ALJ failed to evaluate properly plaintiff's allegations and credibility. Plaintiff alleges that he does not get along well with authority figures and that his bipolar disorder keeps him from

1 working, as he consistently has problems interacting with coworkers and supervisors at
2 work, is argumentative, and often has started fights and hit coworkers (*see* Tr. 21, 23).
3 The ALJ failed to credit fully plaintiff's testimony by finding that his allegations are
4 inconsistent with his activities of daily living, such as living with his girlfriend and
5 helping parent her two children, preparing meals, cleaning, doing laundry, mowing,
6 household repairs, walking, driving a car, riding a bicycle and shopping in stores.
7 However, plaintiff's daily activities are not inconsistent with plaintiff's allegations of
8 disabling argumentative mood and social difficulties with coworkers and supervisors.
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10 Therefore, the ALJ's credibility determination is improper and this matter is
11 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further
12 administrative proceedings.

13 BACKGROUND

14 Plaintiff, MALCOLM LESTER, was born in 1971 and was 37 years old on the
15 alleged date of disability onset of October 30, 2008 (*see* Tr. 128, 132). Plaintiff has only
16 limited education but is able to communicate in English (see Tr. 27). He has past
17 relevant work as an antenna installer, parts salesman and well driller trainer/ construction
18 worker (*see id.*).

19 The ALJ found that plaintiff has at least the severe impairments of "carpal tunnel
20 syndrome, ulnar neuropathy, bipolar disorder, a generalized anxiety disorder and a
21 personality disorder (CFR 404.152(c) and 416.920(c))" (Tr. 20). At the time of the
22 hearing, plaintiff was living with a female roommate and two children (Tr. 40).
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PROCEDURAL HISTORY

On July 23, 2009, plaintiff filed an application for disability insurance (“DIB”) benefits pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (*see* Tr. 18, 128-131, 132-138)). The applications were denied initially and following reconsideration (Tr. 70-77, 78-86). Plaintiff’s requested hearing was held before Administrative Law Judge Dan R. Hyatt (“the ALJ”) on October 13, 2011 (*see* Tr. 33-57). On October 28, 2011, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 15-32).

On May 22, 2013, the Appeals Council denied plaintiff's request for review, making the written decision by the ALJ the final agency decision subject to judicial review (Tr. 1-4). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's written decision in June, 2013 (*see* ECF Nos. 1, 3). Defendant filed the sealed administrative record regarding this matter ("Tr.") on August 19, 2013 (*see* ECF Nos. 12, 13, 14).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Did the ALJ err by failing to evaluate the record as a whole and give proper weight to medical evidence in the record; and (2) Did the ALJ err by not finding the plaintiff credible pursuant to SSR 96-7 (*see* ECF No. 18, pp. 1-2). The Court will address these issues in reverse order.

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STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

(1) Did the ALJ err by not finding plaintiff fully credible?

Defendant concedes that if there is no evidence of malingering, once a claimant has presented objective medical evidence of an underlying impairment that reasonably could be expected to produce the pain or symptoms alleged, “the ALJ must provide clear and convincing reasons to reject a claimant’s testimony” (Defendant’s Brief, ECF No. 27, p. 5 (*citing Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004))).

Here, the ALJ found that plaintiff's "medically determinable impairments caused symptoms resulting in some limitations on work activity," but not to the extent alleged by plaintiff (*see* Tr. 22). However, for the reasons discussed below, the Court finds that the ALJ failed to evaluate properly plaintiff's allegations and credibility.

Plaintiff alleges that he does not get along well with authority figures, as he demonstrated after he was fired when he “mouthing off to the wrong person” (*see* Tr. 21). The ALJ noted that plaintiff testified at the hearing that his bipolar disorder keeps him from working, as he consistently has problems interacting with others at work, is argumentative, and has often started fights and hit coworkers (*see* Tr. 23). Plaintiff

1 testified that he “was stopped forcibly by other coworkers from hitting somebody with a
2 shovel” (Tr. 46).

3 The ALJ failed to credit fully plaintiff’s testimony in part by finding that his
4 allegations are inconsistent with his activities of daily living, such as living with his
5 girlfriend and helping parent her two children, preparing meals, cleaning, doing laundry,
6 mowing, household repairs, walking, driving a car, riding a bicycle and shopping in
7 stores. However, none of the listed daily activities are inconsistent with plaintiff’s
8 allegations of disabling argumentative mood and social difficulties. The only activities
9 listed that cannot be done alone are shopping in stores, living with his girlfriend and
10 helping his girlfriend with parenting. Based on the relevant record as a whole, the Court
11 concludes that plaintiff’s activities of daily living are not inconsistent with plaintiff’s
12 allegations of disabling mood and social difficulties getting along with coworkers and
13 supervisors or authority figures.

15 Regarding activities of daily living, the Ninth Circuit repeatedly has “asserted that
16 the mere fact that a plaintiff has carried on certain daily activities does not in any
17 way detract from [his] credibility as to [his] overall disability.” *Orn v. Astrue*, 495 F.3d
18 625, 639 (9th Cir. 2007) (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
19 2001)). The Ninth Circuit specified “the two grounds for using daily activities to form the
20 basis of an adverse credibility determination: (1) whether or not they contradict the
21 claimant’s other testimony and (2) whether or not the activities of daily living meet “the
22 threshold for transferable work skills.” *Orn, supra*, 495 F.3d at 639 (citing *Fair, supra*,
23 885 F.2d at 603). As stated by the Ninth Circuit, the ALJ “must make ‘specific findings
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1 relating to the daily activities' and their transferability to conclude that a claimant's daily
 2 activities warrant an adverse credibility determination. *Orn, supra*, 495 F.3d at 639
 3 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)).

4 Here, there is no finding of transferability to a work setting and the enumerated
 5 activities of daily living do not contradict plaintiff's other testimony or his allegations of
 6 disability. Therefore, the ALJ's reliance on plaintiff's activities of daily living does not
 7 support his adverse credibility determination. *See id.*

8 The only other reason relied on by defendant for the adverse credibility
 9 determination is lack of support from the objective medical evidence (*see* Tr. 22; *see also*
 10 Tr. 22-27¹). However, once a claimant produces medical evidence of an underlying
 11 impairment, the ALJ may not discredit then a claimant's testimony as to the severity of
 12 symptoms based solely on a lack of objective medical evidence to corroborate fully the
 13 alleged severity of the symptom. *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir.
 14 1991) (*en banc*) (*citing Cotton v. Bowen*, 799 F.2d 1407 (9th Cir. 1986)). As the ALJ's
 15 discussion of the objective medical findings is the only other rationale properly relied on
 16 by the ALJ for his credibility determination other than a list of activities of daily living
 17 that do not contradict plaintiff's allegations, the ALJ's credibility determination is not
 18 proper. *See id.* Therefore, based on the relevant record, the Court concludes that the ALJ

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 23 ¹ *See also* Defendant's Brief, ECF No. 27, p. 8 ("The Commissioner does not rely
 24 on the ALJ's reasoning that Plaintiff's admitted remote history of criminal convictions
 24 undermined his credibility further").

1 erred when evaluating plaintiff's allegations and credibility. For the reasons discussed
2 below, the Court also concludes that the error is not harmless.

3 The Ninth Circuit has "recognized that harmless error principles apply in the
4 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
5 (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
6 Cir. 2006) (collecting cases)). The Ninth Circuit noted that "in each case we look at the
7 record as a whole to determine [if] the error alters the outcome of the case." *Id.* The court
8 also noted that the Ninth Circuit has "adhered to the general principle that an ALJ's error
9 is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Id.*
10 (*quoting Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))
11 (other citations omitted). The court noted the necessity to follow the rule that courts must
12 review cases "'without regard to errors' that do not affect the parties' 'substantial
13 rights.'" *Id.* at 1118 (*quoting Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (*quoting* 28
14 U.S.C. § 2111) (codification of the harmless error rule)).

16 Here, the ALJ failed to credit fully plaintiff's allegations, including his allegations
17 regarding limitations with working around coworkers and reacting appropriately with
18 supervisors: There is no limit on interaction with supervisors in plaintiff's RFC, and
19 plaintiff is found able to engage in occasional coworker interaction by the ALJ (*see* Tr.
20 22). Had plaintiff's allegations been credited fully, plaintiff's RFC likely would be more
21 restrictive, thereby affecting the ultimate disability determination. In addition, the
22 vocational expert testified that if a worker with plaintiff's RFC has a marked impairment
23 in the ability to respond to and tolerate the normal stresses of a regular work

1 environment, “such a person could not sustain competitive employment under those
2 circumstances” (*see* Tr. 54).

3 **(2) Did the ALJ err when evaluating the medical evidence in the record?**

4 The Court already has found that the ALJ committed harmful error in the
5 evaluation of plaintiff’s credibility, *see supra*, section 1. For this reason, the medical
6 evidence should be evaluated anew following remand of this matter. The Court however,
7 notes the following.

8 Plaintiff points out that “the VE acknowledged that with the hypothetical given by
9 the ALJ that if a worker has a marked impairment in the ability to respond to the normal
10 stresses of, and to tolerate the normal stresses of a regular work environment, such a
11 person could not sustain competitive employment under those circumstances” (*see*
12 Opening Brief, ECF No. 18, p. 4; Tr. 53-54). Dr. Shawn Kenderline, Ph.D. examined
13 plaintiff and conducted a mental status examination (“MSE”) (*see* Tr. 294-307). Among
14 other opinions, Dr. Kenderline opined that plaintiff suffered from markedly severe
15 limitations on his ability to respond appropriately to and tolerate the pressures and
16 expectation of a normal work setting (*see* Tr. 296). Although the ALJ gave Dr.
17 Kenderline’s opinion “moderate weight,” finding that the “limitations he proposed are
18 consistent with the overall medical record,” the ALJ failed to provide any reason to
19 discount Dr. Kenderline’s opinion regarding plaintiff’s marked limitation in his ability to
20 deal with normal work expectations and pressures (*see* Tr. 24-25). This opinion by Dr.
21 Kenderline should either be adopted into plaintiff’s RFC and any hypothetical presented
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1 to a VE, or proper reasons should be provided for any failure to do so, as the VE
2 indicated that such a limitation may be dispositive as to disability based on this record.

3 The Court also notes that Dr. Keith Krueger, Ph.D. also conducted an examination
4 and MSE (*see* Tr. 386-94). Similar to the opinion from Dr. Kenderline, Dr. Krueger
5 opined that plaintiff suffered from markedly severe limitations on his ability to
6 communicate and perform effectively in a work setting even with limited public contact
7 (*see* Tr. 388). Although the ALJ gave Dr. Krueger's opinion "significant weight," no
8 reason is provided for failing to include this limitation into plaintiff RFC and for failing
9 to include this limitation into the hypothetical provided to the VE (*see* Tr. 22, 25, 49-50).

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11 The Court also notes further support for this particular opined limitation in that
12 examining psychologist Dr. Michael Brown, Ph.D., likewise examined plaintiff,
13 performed a MSE and opined that plaintiff suffered from markedly severe limitations on
14 his ability to respond appropriately to and tolerate the pressures and expectation of a
15 normal work setting (*see* Tr. 458). In addition, although not opining regarding this
16 specific limitation, Dr. Roy Schegel, M.D., plaintiff's treating psychiatrist, conducted a
17 psychiatric evaluation, diagnosed bipolar disorder and posttraumatic stress disorder, and
18 opined that plaintiff global assessment of functioning ("GAF") was 43, "indicating severe
19 symptoms," as noted by the ALJ (*see* Tr. 25 (*citing* Tr. 452)). Supporting all of these
20 opinions, Dr. Dana Harmon opined that plaintiff meets Listing 12.04 based on the
21 limiting affects of his bipolar disorder (*see id.*, Tr. 461). Even the state agency, non-
22 examining medical consultants, whose opinions were given "great weight" by the ALJ
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1 opined that plaintiff “works best in job settings that do not require ongoing and more
 2 intense dealings with the public, supervisors or coworkers” (Tr. 26 (*citing* Tr. 354, 377)).

3 The medical evidence should be evaluated further, especially with respect to
 4 plaintiff’s ability to respond appropriately to and tolerate the normal pressures and
 5 expectations of normal work settings.

6 **(3) Should this matter be reversed and remanded for further proceedings
 7 or for an award of benefits.**

8 Generally when the Social Security Administration does not determine a
 9 claimant’s application properly, ““the proper course, except in rare circumstances, is
 10 to remand to the agency for additional investigation or explanation.”” *Benecke v.*
 11 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth
 12 Circuit has put forth a “test for determining when [improperly rejected] evidence
 13 should be credited and an immediate award of benefits directed.” *Harman v. Apfel*,
 14 211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292
 15 (9th Cir. 1996)). It is appropriate when:

16 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such
 17 evidence, (2) there are no outstanding issues that must be resolved before a
 18 determination of disability can be made, and (3) it is clear from the record
 19 that the ALJ would be required to find the claimant disabled were such
 evidence credited.

20 *Harman, supra*, 211 F.3d at 1178 (*quoting Smolen, supra*, 80 F.3d at 1292).

21 Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292. Further
 22 analysis of the medical record is required. Furthermore, the decision whether to remand a
 23 case for additional evidence or simply to award benefits is within the discretion of the
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1 court. *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989) (*citing Varney v. Secretary*
2 *of HHS*, 859 F.2d 1396, 1399 (9th Cir. 1988)).

3 CONCLUSION

4 The ALJ erred in his review of plaintiff's credibility as plaintiff's activities of
5 daily living do not contradict his other testimony or his allegations of disabling social
6 limitations. The medical evidence requires further review.

7 Based on these reasons and the relevant record, the Court **ORDERS** that this
8 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
9 405(g) to the Acting Commissioner for further consideration.

10 **JUDGMENT** should be for plaintiff and the case should be closed.

11 Dated this 16th day of May, 2014.

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J. Richard Creatura
United States Magistrate Judge